Opinion issued March 11, 2014

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-01001-CR

ANTONIO RUIZ PEREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1309538

O P I N I O N

A jury convicted appellant, Antonio Ruiz Perez, of driving while intoxicated ("DWI"), third offense, and the trial court assessed his punishment at twenty-five years' confinement. In two points of error, appellant argues that the trial court

erred in denying his motion to suppress because: (1) the arresting officer lacked probable cause to arrest him without a warrant and (2) the warrantless taking of his blood sample violated the Fourth Amendment under to *Missouri v. McNeely*.

We affirm.

Background

At approximately 11:50 p.m. on June 10, 2011, Officer B. McCandless observed a red Corvette failing to maintain a single marked lane and followed it for several miles. After observing further unsafe driving, Officer McCandless initiated a traffic stop, and the Corvette exited the highway and stopped in the outside lane of the service road. Upon approaching the Corvette, Officer McCandless observed that appellant was the driver and that a strong odor of alcohol was coming from the vehicle. Officer McCandless testified that appellant stated that he had been drinking, so he administered the horizontal gaze nystagmus (HGN) test and determined that appellant showed signs of intoxication. Officer McCandless detained appellant and decided to conduct additional sobriety testing in a safer environment. However, appellant refused to provide a breath specimen.

Pursuant to his detention of appellant, Officer McCandless obtained appellant's criminal history through the station's dispatch system and determined that he had two prior DWI convictions. Officer McCandless then took appellant to a hospital where appellant's blood was drawn at approximately 1:20 a.m. on June

11. The blood test revealed that appellant had a blood alcohol level of 0.17, more than twice the legal limit.

At trial, appellant filed a general motion to suppress that did not specifically mention the blood draw but argued generally that "[t]he acquisition of the evidence which the Government will offer in this cause was not pursuant to a search warrant, was absent exigent circumstances, and made without probable cause to believe the Accused was engaged in criminal activity or that such evidence, if any, was in danger of being destroyed." Officer McCandless was the only witness at the hearing on the motion to suppress. He testified that a little before midnight on June 10, 2011, he observed a red Corvette "swerving and failing to maintain a single marked lane" in a manner that posed a danger to the surrounding vehicles. The officer testified that based on his "past experience and the past arrests that [he] had made, just seeing the way that [the Corvette driver] was acting, the time of night and the roadway that [they] were on, that led me to believe that he was possibly intoxicated" or impaired by some means. Officer McCandless then initiated the traffic stop. Appellant cross-examined Officer McCandless on the basis for his probable cause to initiate the traffic stop. Appellant then asked "that the court suppress the arrest as well as the video." The trial court denied the motion to suppress.

Appellant's attorney then stated:

> On the record, I am making an objection to the mention, to the admission, to any reference to the blood test, taking results or anything dealing with the blood test of my client, [appellant], based on the failure of the State to get a warrant for the blood taking under the Statute 725, I believe it is, 12(b).
>
> There is no authority for the officer to take the blood of my client without a warrant, and that is what he did in this case.
>
> My client was under arrest. He invoked his right to counsel prior to the taking of—or the request for the blood. He refused to do the request for blood and breath. He was taken to the hospital.

He further stated that the officer failed to fill out the "THP-51" form correctly because he did not check one of the boxes and "he used this authority to withdraw blood against my client's consent and denied him of his constitutional right of illegal search and seizure in this case." He went on to argue that Officer McCandless "didn't follow the statutory authority that required him to in this particular case to have a warrant before he withdrew the blood from my client." Appellant asked the trial court to suppress "any aspects of a blood test in this case."

The State responded that Transportation Code section 724.012 was the controlling authority in this case and that it did not require that a search warrant be obtained if one of the listed criteria was met. The State also argued that the "THP-51 form is merely a form with regard to liability" and that "the officer's testimony

would be the best form of evidence as to this case and why a mandatory blood draw was a necessity."[1] Appellant responded:

> Therefore, it will be the Constitution of the United States as well as the statutory laws of the State of Texas on the search and seizure law; and I don't believe that the State has properly followed the law when they withdrew the blood here and the statutory and the constitutional law and case law regarding withdrawal of blood with a warrant. They didn't obtain a warrant. This is a warrantless search while the person was in custody under arrest and while the person also invoked his right to counsel; and therefore, a mandatory warrant would be the only way that they could withdraw blood in this case.

The trial court verified that the State was relying on Transportation Code section 724.012(b)(3)(B). It then denied appellant's motion to "suppress or deny the admission of the blood test."

At trial, Officer McCandless testified before the jury regarding his arrest of appellant for DWI. He testified again regarding his observations that led him to initiate the traffic stop. He stated that when he made contact with appellant he "could smell a strong odor of alcoholic beverage emitting from the vehicle." He further testified that appellant "admitted to having been drinking" and "could not remember how many he had to drink." Officer McCandless also observed when appellant exited the vehicle that appellant was "slightly unsteady" and "not balanced." He testified that he then administered the HGN test to appellant, which

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[1] Form THP-51 is the statutory authorization form that allows a peace officer to require that a hospital perform a mandatory blood drawing. *See* TEX. TRANSP. CODE ANN. § 724.012(b) (Vernon 2011); *State v. Neesley*, 239 S.W.3d 780, 782 n.2 (Tex. Crim. App. 2007).

is a test "where we check the eyes and have them follow a stimulus or your finger with both of their eyes to check to see if there is equal tracking, to check to see if there is any involuntary jerking or bouncing of the eye." Officer McCandless observed "a lack of smooth pursuit," which indicated to him that appellant was intoxicated.

Rather than completing the remainder of the HGN test, he decided "to detain [appellant] to get us off of the roadway for my safety and his." Officer McCandless testified that he believed it would have been unsafe to administer the full battery of field sobriety tests at the location where appellant stopped his vehicle because they were "in a moving lane of traffic," making it more likely that they could be struck by traffic exiting the nearby highway or driving along the service road. He handcuffed appellant and placed him in the police vehicle to "take him back to [the] station to complete the standardized field sobriety tests in a controlled environment."

However, upon returning to the station, appellant refused to complete any of the field sobriety tests. At that point, based on appellant's driving, "the strong odor of alcohol emitting from the vehicle, the time of night, the fact that he started drinking at 7:00 and [could not] remember how many alcoholic beverages he had consumed," Officer McCandless placed appellant under arrest for suspicion of DWI and asked for a breath or blood specimen. He read appellant a statutory

warning advising that he was under arrest for DWI, that a refusal to submit a specimen would result in having his license taken away, and that such a refusal could be used as potential evidence of guilt in any future proceedings. Appellant refused to give a breath or blood sample and refused to sign the statutory warning.

At that point, Officer McCandless asked the station's dispatch to run appellant's criminal history, and he discovered that appellant had at least two prior DWI convictions. At trial, appellant stipulated, for jurisdictional purposes only, to the existence of two prior DWI convictions. Officer McCandless testified that the two prior convictions satisfied the statutory requirement for obtaining a mandatory blood specimen, stating, "At the time of the suspect's arrest, I possessed or received reliable information from a credible source that on two or more occasions the suspect had previously been convicted of or placed on community supervision of an offense under [the appropriate sections of the] Texas Penal Code." He transported appellant to a local hospital where his blood was drawn at 1:20 a.m. on June 11, 2011.

Wesley Colwell, the nurse who drew appellant's blood, testified regarding the procedure he employed to take appellant's blood sample. Dr. Jeff Walterscheid, the assistant chief toxicologist at the Harris County Institute of Forensic Sciences, testified regarding the results of appellant's blood test. He

testified that appellant had a blood alcohol level of 0.17, which was "roughly double" the legal limit.

The jury convicted appellant of DWI and the trial court assessed his punishment at twenty-five years' confinement. This appeal followed.

Analysis

Appellant argues that the trial court erred in failing to suppress the results of his blood draw.

A. Standard of Review

We review a denial of a motion to suppress evidence for an abuse of discretion. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). When we review a trial court's denial of a motion to suppress, we give "almost total deference to a trial court's express or implied determinations of historical facts [while] review[ing] de novo the court's application of the law of search and seizure to those facts." *Id.* We view the evidence in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007) (quoting *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)). The trial court is the "sole trier of fact and judge of credibility of the witnesses and the weight to be given to their testimony." *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). The trial court may choose to believe or disbelieve any part or all of a

witness's testimony. *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996). We sustain the trial court's ruling only if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

B. Probable Cause to Arrest

In his first point of error, appellant argues that the trial court erred in denying his motion to suppress and admitting his blood test results because the State did not show probable cause for his warrantless arrest for DWI.

The Fourth Amendment to the United States Constitution, which is made applicable to the states by the Due Process Clause of the Fourteenth Amendment, guarantees that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated." U.S. CONST. amends. IV, XIV; *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). Under the Fourth Amendment, a warrantless arrest for an offense committed in the officer's presence is reasonable if the officer has probable cause. *Amador*, 275 S.W.3d at 878 (citing *United States v. Watson*, 423 U.S. 411, 418, 96 S. Ct. 820 (1976)). "'Probable cause' for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in

believing that the person arrested had committed or was committing an offense." *Id.* (citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223 (1964)).

A finding of probable cause requires "more than bare suspicion" but less than would justify conviction. *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302 (1949)). The test for probable cause is objective, "unrelated to the subjective beliefs of the arresting officer," and "it requires a consideration of the totality of the circumstances facing the arresting officer." *Id.* Once a defendant has carried his initial burden of producing some evidence rebutting the presumption of proper police conduct—i.e. by establishing that the seizure occurred without a warrant—the burden shifts to the State to prove that the seizure was nonetheless reasonable. *Id.*

Here, evidence at the suppression hearing indicated that Officer McCandless observed appellant commit a moving violation by failing to maintain his lane and observed appellant weaving within his lane and crossing onto the shoulder. Officer McCandless testified that he was concerned appellant's driving posed a danger to the other drivers on the roadway. When Officer McCandless pulled appellant over, he smelled a strong odor of alcohol coming from appellant's vehicle, appellant acknowledged that he had consumed alcoholic beverages, and appellant was unsteady on his feet as he complied with Officer McCandless's request that he exit the vehicle. Officer McCandless also administered a portion of the HGN test and

determined that appellant was possibly intoxicated, and appellant refused to cooperate with further field sobriety testing. Given the totality of the circumstances, this evidence constituted "more than a bare suspicion" and was sufficient to warrant Officer McCandless's belief that appellant had committed the offense of DWI. *See id.*

Appellant argues that this case is similar to *State v. Mosely*, and, thus, we should reverse the trial court. However, we consider *Mosely* to be distinguishable from the present case. The trial court in *Mosely* granted the defendant's motion to suppress and its findings of fact and conclusions of law supported that ruling, which is not the case here. *See* 348 S.W.3d 435, 441 (Tex. App.—Austin 2011, pet. ref'd) ("The question we must answer is whether this record so thoroughly satisfies the State's burden of establishing that [the officer] had probable cause to arrest Mosely for DWI that the trial court's ruling to the contrary was an abuse of discretion."). Furthermore, while the court in *Mosely* concluded that evidence that Mosely had caused an accident, his breath smelled of alcohol, his eyes were bloodshot, and he had admitted to having a couple of drinks did not constitute evidence of probable cause in that case, the State here presented additional evidence establishing Officer McCandless's probable cause for arresting appellant. *See id.* at 441 (concluding State did not establish that Mosely "lacked the normal use of his mental or physical faculties" because no officer performed field sobriety

testing or "form[ed] an opinion as to whether Mosely was intoxicated"; officers did not observe slurred speech, trouble maintaining balance, or "anything else to suggest that [Mosely] was physically or mentally impaired").

Here, as we have already stated, Officer McCandless observed appellant driving in an unsafe manner that violated at least one provision of the Transportation Code; appellant smelled strongly of alcohol and admitted that he had been drinking; and appellant was unsteady on his feet. Officer McCandless testified that the circumstances surrounding appellant's traffic stop, including the unsafe driving, the unsafe location appellant chose to pull over, and appellant's actions and speech at the time he was stopped, led him to form the opinion that appellant was intoxicated, unlike the officers in *Mosely* who testified that they did not form an opinion regarding whether Mosely was intoxicated. *See Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd) (concluding that officer's testimony "that an individual is intoxicated is probative evidence of intoxication."). And, unlike *Mosely*, in which officers did not administer field sobriety tests to Mosely, appellant failed the only portion of the field sobriety testing to which he submitted, refused to allow Officer McCandless to complete the field sobriety testing, and refused to provide a breath or blood sample. *See* TEX. TRANSP. CODE ANN. § 724.061 (Vernon 2011) ("A person's refusal of a request by an officer to submit to the taking of a specimen of breath or

blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial."); *Bartlett v. State*, 270 S.W.3d 147, 153 (Tex. Crim. App. 2008) (observing that defendant's refusal to submit to breath test is admissible under Transportation Code section 724.061 as tending to show defendant's consciousness of guilt). Thus, we conclude that *Mosely* is distinguishable from the present case.

We cannot conclude that the trial court abused its discretion in denying appellant's motion to suppress on this ground. We overrule appellant's first point of error.

C. Constitutionality of Blood Draw

In his second point of error, appellant argues that the warrantless taking of his blood sample violated his Fourth Amendment rights by requiring him to submit to a blood test without his consent and without other justification for the search.

The taking of a blood specimen is a search and seizure under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966). A warrantless search or seizure is per se unreasonable, unless it falls under a recognized exception to the warrant requirement. *Katz v. United State*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000). One such exception is a search conducted pursuant to consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44

(1973). The Court of Criminal Appeals has stated that "[t]he implied consent law does just that—it implies a suspect's consent to a search in certain instances. This is important when there is no search warrant, since it is another method of conducting a constitutionally valid search." *Beeman v. State*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002) (en banc). The Court of Criminal Appeals held,

> The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant.

Id. at 616.

Both the United States Supreme Court and the Court of Criminal Appeals have recognized a two-part analysis for determining the legality of a blood draw: reviewing courts must determine whether the police were justified in requiring the appellant to submit to a blood test and whether the means and procedures employed in taking the blood respected the relevant Fourth Amendment standards of reasonableness. *See State v. Johnston*, 336 S.W.3d 649, 658 (Tex. Crim. App. 2011) (citing *Schmerber*, 384 U.S. at 768, 86 S. Ct. at 1834).

Section 724.012(b)(3)(B) provides that "[a] peace officer shall require the taking of a specimen of the person's breath or blood if . . . the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle . . . and the person refuses the officer's request to submit to the

taking of a specimen voluntarily" if, "at the time of the arrest, the officer possesses or receives reliable information from a credible source that the person . . . on two or more occasions, has been previously convicted of . . . an offense under Section 49.04, 49.05, 49.06, or 49.065, Penal Code." TEX. TRANSP. CODE ANN. § 724.012(b)(3)(B).

The State presented evidence that satisfied the elements of this implied consent statute. Officer McCandless testified that he arrested appellant for suspicion of DWI when appellant refused to comply with further field sobriety testing or to provide a breath or blood sample voluntarily. Pursuant to this arrest, Officer McCandless asked the station's dispatcher to provide him a copy of appellant's criminal history. The copy of appellant's criminal history from the dispatcher provided McCandless with reliable information from a credible source that appellant had at least two previous DWI convictions. Appellant stipulated to the two previous convictions at trial for "jurisdictional purposes" and does not challenge their existence on appeal. Thus, the State established that the blood sample was taken pursuant to section 724.012(b)(3)(B), which served to imply appellant's consent to the taking of the blood sample. *See id.*; *Beeman*, 86 S.W.3d at 615–16. We conclude that this is evidence of implied consent that the police were justified in relying on under the circumstances of this case in requiring appellant to submit to a blood test. *See Johnston*, 336 S.W.3d at 658.

In part of his second point of error, appellant argues that Transportation Code section 724.012(b) is itself unconstitutional because it "cannot authorize what the Constitution forbids." However, he did not argue in the trial court that the statute itself was unconstitutional because it provides for implied consent to a blood draw. He complained only that the taking of his blood violated his Fourth Amendment rights by requiring him to submit to a warrantless blood test without consent. Thus, he did not preserve his complaint that the statute is unconstitutional because it authorizes warrantless blood draws based on implied consent. *See* TEX. R. APP. P. 33.1. Accordingly, we need not address his argument that section 724.012(b) is unconstitutional in light of *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

We conclude that the warrantless taking of appellant's blood sample in compliance with Transportation Code section 724.012(b) did not violate his Fourth Amendment rights by requiring him to submit to a warrantless blood test without his consent. We express no opinion as to the constitutionality of implied consent. We overrule appellant's second point of error.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Publish. TEX. R. APP. P. 47.2(b).